U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

Date: APR 0 7 2014 Office: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

APPLICATION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A).

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an "alien of extraordinary ability" in the arts, specifically as a musical director, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate the alien's "sustained national or international acclaim" and present "extensive documentation" of the alien's achievements. *See* section 203(b)(1)(A)(i) of the Act and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten categories of specific objective evidence. 8 C.F.R. § 204.5(h)(3)(i) through (x). The petitioner must submit qualifying evidence under at least three of the ten regulatory categories of evidence to establish the basic eligibility requirements.

On appeal, the petitioner asserts that the director did not fully consider the additional evidence that he submitted in response to the Request for Evidence (RFE). The petitioner asserts that the submitted evidence, considered in its entirety, establishes his eligibility as an alien of extraordinary ability.

I. LAW

Section 203(b) of the Act states, in pertinent part, that:

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.*; 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that the petitioner demonstrate the alien's sustained acclaim and the recognition of his or her achievements in the field. Such acclaim must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through the submission of qualifying evidence under at least three of the ten categories of evidence listed at 8 C.F.R. § 204.5(h)(3)(i)-(x).

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.[1] With respect to the criteria at 8 C.F.R. § 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.* at 1121-22.

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. In this matter, the AAO will review the evidence under the plain language requirements of each criterion claimed. As the petitioner did not submit qualifying evidence under at least three criteria, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.*

II. ANALYSIS

A. Evidentiary Criteria[2]

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[1] Specifically, the court stated that the AAO had unilaterally imposed novel substantive or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

[2] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor. 8 C.F.R. § 204.5(h)(3)(i).

The director determined that the petitioner did not establish his eligibility under this regulation through submission of his nomination for the The director properly concluded that the evidence of record did not demonstrate that the petitioner actually received the On appeal, the petitioner asserts that the director did not fully consider the second letter from which the petitioner submitted in response to the director's RFE.

In his second letter, writes:

> or nomination is to Canadian theatre therefore what a Tony nomination is to an American theatre artist.
>
> In rebuttal to the evidence that a nomination does not represent a significant award, I would draw a comparison to a TONY nomination, as an equivalent value in the field of Canadian Theatre, and that it represents the highest level of achievement possible in Canadian Theatre, and that it is recognized both Nationally and Internationally [sic] as such.

Regardless of the level of achievement required to receive a nomination and resulting prestige associated with the nomination, the plain language of 8 C.F.R. § 204.5(h)(3)(i) requires receipt of awards and prizes and does not include nominations of awards and prizes. Thus, the director properly concluded that the petitioner did not submit evidence showing that he actually received the I *See Rijal v. USCIS*, 772 F.Supp.2d 1339, 1345 (W.D. Wash. 2011) (noting that Congress entrusted the decision of defining and classifying awards to the administrative process).

Accordingly, as the petitioner did not document his receipt of a qualifying award, the record supports the director's conclusion that the petitioner has not established that he meets the plain language requirements of 8 C.F.R. § 204.5(h)(3)(i).

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. 8 C.F.R. § 204.5(h)(3)(ii).

The director considered the petitioner's membership in th and evidence relating to the petitioner's membership in the and determined that the petitioner did not satisfy the requirements under 8 C.F.R. § 204.5(h)(3)(ii). On appeal, the petitioner asserts that the director did not consider the documentary evidence he submitted in the RFE response relating to his membership in the The evidence relating to his membership in the

in his letter, states the following about the

> was established in 1921, and has had among its members some of the most distinguished playwrights, composers, and lyricists. . . . This list alone establishes the distinguished and impressive company that anyone in the [sic] keeps. Furthermore, membership in this is exclusive and restricted only to playwrights/composers/lyricists who have had a first class professional production of a play in either a New York, Off-Broadway, Broadway or a first class "LORT" type regional theatre.

In the final paragraph of the letter, includes an alleged excerpt from the ' page":

> In 2010, the Council voted to revise the categories of membership to more accurately reflect the landscape of American theatre today. There are now only two levels of membership, *Member* and *Associate*.
>
> To qualify for the new *Member* level, a writer must have either had work professionally produced or published by an established publisher. Professional production is no longer defined by the size of the theatre but simply by whether tickets were sold to the public. All playwrights, composers, lyricists and librettists interested in membership, but who do not meet one of the above criteria, may join at the *Associate* level.

As an initial matter, while specifically mentions the names of well-known individuals in the field who are members, or were previously members of the the record does not establish that only individuals with comparable levels of achievement belong to the guild. At issue is whether the guild requires outstanding achievements for membership, not whether the guild includes some members who happen to have demonstrated outstanding achievements. Furthermore, while s attests that only individuals who "have had a first class professional production of a play in either a New York, Off-Broadway, Broadway or a first class 'LORT' type regional theatre" can be members, the governing Constitution for the guild contains different requirements for members. Specifically, the article defining qualifying "paid public performances" states that the phrase:

> shall include, BUT SHALL NOT BE LIMITED TO, "First Class Productions", "Off-Broadway Productions", and "LORT Productions", as such terms are defined in the Approved Production Contract.

(Capitalization in original.) In addition, the membership committee may admit as members any "dramatist, bookwriter, composer or lyricist who, by virtue of previous professional production of his or her work on the stage, or any author of theatrical dramatic or dramatico-musical material from which such work for the stage is adapted, has, in the opinion of the Membership Committee achieved professional status comparable to that of a person" whose work has been presented in a paid public performance. The requirements are effective as of February 25, 2010. The letter from Director of Membership for the guild, acknowledging the petitioner's membership is dated October 31

2012. The letter states that membership at the Member level indicates "either that you have had work professionally produced or published."

The primary evidence of the requirements for membership, the organization's Constitution, has a broad definition of qualifying "paid public performances." It also reveals that membership is open to those who demonstrate a professional status. Consistent with this information, states that membership is available to an applicant who has had work professionally produced or published. While states that the percentage of "actively aspiring composer/playwrights and music directors" whose work appears in a professional production in a major regional or off-Broadway theater is "tiny," the current bylaws state that a professional production now is defined by whether "tickets were sold to the public," rather than the size or quality of the production. An ability to work successfully in one's occupation, even a competitive one with aspirants who may not succeed, is not an outstanding achievement for someone working in that occupation.

The plain language of the regulation also requires that the petitioner submit evidence that recognized or international experts judge the outstanding achievements of the members for entry. The petitioner has not submitted documentation showing that national or international experts judge potential members for entry into the guild. Rather, the bylaws state that the guild's council appoints the three-member Membership Committee members without discussing the credentials of the committee members.

Finally, the petitioner does not contest the director's conclusions relating to the Canadian Federation of Music and . Consequently, the petitioner abandoned these claims. *See Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885, *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

Accordingly, for the foregoing reasons, the petitioner does not meet the requirements for this criterion.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

The director determined that the petitioner did not submit qualifying evidence to establish his eligibility under 8 C.F.R. § 204.5(h)(3)(iii). In making his determination, the director considered the published material that the petitioner submitted from the following publications or media sources: *Playbill.com*; *Nightlife Exchange.com*; *ReviewsofBroadway.com*; *Winnipeg Free Press*; *Toronto Star*; *NowToronto.com*; *CBC.Ca*; *TheStar.com*; *Blogto.com*; *Mytowncrier.com*; *Oakville Beaver*; *Burlington Post*; *The Standard Spectrum*; *Belfry Theatre*; *Uptown Magazine*; *Euroclubdejazz.com*; and *The Scarborough Mirror*.

The director properly noted that to meet the plain language requirements of the regulation, the petitioner must submit published material that is about the petitioner. Much of the submitted material only briefly mentioned the petitioner and did not discuss the petitioner to a degree such that the material is about him, as required by the regulation.

On appeal, the petitioner asserts that he submitted substantial evidence relating to the circulation and significance of the media and publications in response to the director's RFE. The petitioner submitted a letter from and are major media. The petitioner also included circulation data on various publications, with notations next to the names of publications or online sites on which the published materials he submitted appeared. Along with the RFE response, the petitioner also submitted for the first time an online article that appeared on which reviewed multiple shows, including one of the petitioner's shows. The petitioner also submitted statistics relating to the web traffic for

While many of the publications, for which the petitioner submitted circulation or statistical data, would qualify as major media, the articles from those publications that the petitioner submitted were not about the petitioner. For instance, the petitioner submitted a copy of an article included on that highlights upcoming performances in the area that includes information about a production for which the petitioner wrote the lyrics and music. The article acknowledges the petitioner and his name appears in the description about the musical. However, the description for is one of at least six descriptions in the eight-page article, of which the petitioner submitted two pages. Regardless of the total number of productions or shows discussed in the article, the inclusion of the petitioner's name in a brief description of one of his plays does not constitute published material about the petitioner, as required by the regulatory language. *See generally Negro-Plumpe v. Okin,* 2:07-CV-820-ECR-RJJ at 7 (D. Nev. Sept. 8, 2008) (upholding a finding that articles about a show are not about the actor).

All but one of the remaining articles that the petitioner submitted similarly are not about the petitioner, relating to his work. One exception is an article titled which appears in The petitioner is the focus of that article and is quoted discussing the performance schedule for and the development process for the production. The submitted circulation numbers for *The Standard* reflect that the paper is based in and has a daily circulation of 18,123, consistent with a regional newspaper. Other newspapers on the list the petitioner submitted show a circulation above 100,000. Thus, in light of the limited circulation of the paper does not constitute major media. In addition, the copy of the article the petitioner submitted does not show the date of the article, and as such, it fails to meet the requirement that published material include the title, date and author of the material.

Accordingly, the petitioner has not established his eligibility for this criterion.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv).

The petitioner originally did not submit documentary evidence relating to this criterion. In response to the director's RFE, however, the petitioner submitted two letters stating that for various productions, invited him to participate as a panelist at various auditions to help select musicians and cast members. The letters the petitioner submitted in the

RFE response meet the plain language requirements pursuant to 8 C.F.R. § 204.5(h)(3)(iv). Accordingly, the AAO concludes that the petitioner met this criterion.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v).

The director considered the fifteen letters of support the petitioner submitted as evidence of his eligibility, but after considering the letters, the director properly concluded that the submitted letters did not establish the petitioner's contributions of major significance in the field. On appeal, the petitioner contends that the director did not consider the three additional letters that he submitted in the RFE response that attest to the unique and innovative nature of the petitioner's work.

In his support letter, , writes:

> To my professional eyes " ' is the hallmark of what producers look for in hit commercial property: wide audience appeal, an exceptionally well-crafted script and music, and very important: [sic] a potentially very low cost-to-profit ratio, i.e., very low production costs (a very small cast, one set and all the music played by one of the cast members) vs. a large potential audience.

The petitioner asserts on appeal that interest in the petitioner's career and investment in the petitioner's original work demonstrates contributions of major significance in the field. However, letter describes the commercial viability, marketability, and potential for business profit from the petitioner's work. While commercial viability and potential for profit are important factors for an investor who has invested in the petitioner's work product, the potential for commercial success is not evidence of past significant contributions that have had an impact in the field.

Regarding the letter from , the letter attests to the petitioner's unique musical talents and innovations relating to transitions from a spoken scene to a musical number. , writes in his letter: "[The petitioner's] unique and innovative approach to music was what made him the most desirable candidate we could find in the country in this field." While both letters discuss the petitioner's unique talents and innovations, they do not provide specific examples of how his innovations impacted the field as a whole. *See Visinscaia v. Beers*, --- F. Supp. 2d ---, 2013 WL 6571822, at *6, 8 (D.D.C. Dec. 16, 2013) (upholding a finding that a ballroom dancer had not met this criterion because she did not demonstrate her impact in the field as a whole).

Accordingly, the petitioner has not established eligibility under 8 C.F.R. § 204.5(h)(3)(v).

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media. 8 C.F.R. § 204.5(h)(3)(vi).

The petitioner previously submitted evidence under this criterion. The director's decision concluded that the petitioner did not meet this criterion and the petitioner does not identify any factual or legal error relating to this criterion on appeal. Consequently, the petitioner abandoned this claim. *See*

Sepulveda, 401 F.3d at 1228 n. 2,; *Hristov*, 2011 WL 4711885, at *9 (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

Evidence of the display of the alien's work in the field at artistic exhibitions or showcases. 8 C.F.R. § 204.5(h)(3)(vii).

The petitioner initially submitted evidence under this criterion along with his Form I-140. The director determined in his denial decision that the petitioner did not meet the requirements of the regulation. The petitioner does not raise this issue on appeal. USCIS, therefore, determines that the petitioner abandoned this claim. *See Sepulveda,* 401 F.3d at 1228; *Hristov*, 2011 WL 4711885, at *9.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation. 8 C.F.R. § 204.5(h)(3)(viii).

This criterion anticipates that a leading role should be apparent by its position in the overall organizational hierarchy and that it be accompanied by the role's matching duties. A critical role should be apparent from the petitioner's impact on the organization or the establishment's activities. The petitioner's performance in this role should establish whether the role was critical for organizations or establishments as a whole. The petitioner must demonstrate that the organizations or establishments have a distinguished reputation. While neither the regulation nor precedent speak to what constitutes a distinguished reputation, Merriam-Webster's online dictionary defines distinguished as, "marked by eminence, distinction, or excellence."[3] Dictionaries are not of themselves evidence, but they may be referred to as aids to the memory and understanding of the court. *Nix v. Hedden,* 149 U.S. at 306. Therefore, it is the petitioner's burden to demonstrate that the organizations or establishments claimed under this criterion are marked by eminence, distinction, excellence, or a similar reputation. The petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

The director concluded there was insufficient evidence in the record to meet this criterion. More specifically, the director determined that the petitioner did not establish that the organizations or establishments for which he served in a leading or critical role have distinguished reputations. On appeal, the petitioner contends that the director did not properly weigh the additional letters from the

, writes in his letter that his company is the largest ongoing musical theatre production company in North America and that his company "has been the innovator in touring musical theatre for over two decades." The size of and the company's innovations in theatre production do not equate to a distinguished reputation in the field. Moreover, USCIS need not rely on an entity's own vague claims of prestige. *Cf. Braga v. Poulos*, No. CV 06 5105 SJO (C.D. CA July 6, 2007) *aff'd* 2009 WL 604888 (9th Cir. 2009) (finding that USCIS need not rely on the self-promotional material of a publisher). Thus, the record does not sufficiently establish that has a distinguished reputation.

[3] *See* http://www.merriam-webster.com/dictionary/distinguished, accessed on March 24, 2014.

In contrast, the record does include documentation showing that a crossover singing group, enjoys a distinguished reputation in the recording industry and as performance artists. For example, their debut album went platinum. , however, is a musical performance group consisting of classically trained vocalists. While a musical performance group can constitute an organization or an establishement, depending on the specific facts and circumstances, the petitioner has failed to submit evidence showing that the performance group, , is an organization or an establishment.

For all of the foregoing reasons, the petitioner does not meet this criterion.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

The director determined that the petitioner failed to satisfy the requirements under 8 C.F.R. § 204.5(h)(3)(ix). On appeal, the petitioner asserts that he submitted sufficient evidence to meet the criterion. More specifically, the petitioner states that USCIS failed to consider the evidence that he submitted as part of the RFE response, including a letter from (income statements) from 2009 and 2010.

As part of the initial evidence package, the petitioner included various contracts for individual shows and/or productions. The petitioner submitted the following contracts: two 1998 contracts with the , a 1999 contract with the ; a 2002 contract with the , a 2005 contract with ; a 2007 contract with The petitioner also submitted T4A Forms for 2009 and 2010, which show his annual income. The 2009 form lists the sole payer's name as

In addition writes in her support letter:

> I can go on record as saying that [the petitioner's] salary . . . for the 22 months that he worked as Associate Music Director for the ; was the highest salary we have ever paid an Associate Director in the 9 years that I have been in this business.

The submitted contracts, 2009 and 2010 T4A Forms, and letter reveals a significant upward trend in the petitioner's weekly salary as a Music Director. Significantly, the record also includes the 2010 U.S. Bureau of Labor Statistics wage information for Music Directors and Composers, which lists the 90th percentile wage estimate for Independent Artists as well below the petitioner's wages. The wage estimate, combined with letter, the contract information and tax information that the petitioner submitted, establishes that the petitioner met the requirements of 8 C.F.R. § 204.5(h)(3)(ix). Accordingly, the AAO withdraws the director's determination in this regard.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales. 8 C.F.R. § 204.5(h)(3)(x).

The petitioner asserts on appeal that the director did not consider the evidence submitted in the RFE response, including box office totals by city of the tour of and the receipts from the production of and did not render a decision on the petitioner's eligibility pursuant to 8 C.F.R. § 204.5(h)(3)(x). The petitioner, along with his Form I-140, initially submitted letters attesting that the petitioner's efforts contributed to the financial success of various musical productions and articles highlighting the success of productions for which he worked.

The record reflects that the petitioner was involved in musical productions, such as the tour of which had commercial success. Nevertheless, in a large-scale internationally touring musical, it is expected that there would be a large number of individuals in the cast and crew. Not every person who is involved in such a project enjoys commercial success in the performing arts. The record lacks evidence that the petitioner is named in the promotional material or can otherwise be credited with the promotional success of the tour. According to the actual contract, the petitioner's position with the touring company was assistant conductor. the associate director, explains that as the associate conductor, the petitioner was "called upon to musically direct the understudy rehearsals and occasionally conduct the show." The petitioner has not demonstrated that this position is responsible for the commercial success of the show. Absent such a showing, the petitioner cannot satisfy the criterion as contemplated by the regulations and the Act. Regarding the receipts for the receipts for two weeks of performances, showing weekly grosses of $18,763 and $14,272, where the total tickets sold were 574 and 487 per week, are insufficient to demonstrate commercial success. By contrast, and the other shows on the list the petitioner submitted reflect, for comparable numbers of weekly performances, thousands of attendees and weekly grosses of hundreds of thousands of dollars.

Accordingly, the petitioner does not meet this criterion.

B. Summary

The petitioner has failed to submit sufficient relevant, probative evidence to satisfy the regulatory requirement of three types of evidence.

III. CONCLUSION

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Had the petitioner submitted the requisite evidence under at least three evidentiary categories, in accordance with the *Kazarian* opinion, the next step would be a final merits determination that considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor" and (2) "that the alien has sustained national or international

acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. §§ 204.5(h)(2) and (3); *see also Kazarian,* 596 F.3d at 1119-20. While the AAO concludes that the evidence is not indicative of a level of expertise consistent with the small percentage at the very top of the field or sustained national or international acclaim, the AAO need not explain that conclusion in a final merits determination.[4] Rather, the proper conclusion is that the petitioner has failed to satisfy the regulatory requirement of three types of evidence. *Id.* at 1122. The petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.

[4] The AAO maintains de novo review of all questions of fact and law. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In any future proceeding, the AAO maintains the jurisdiction to conduct a final merits determination as the office that made the last decision in this matter. 8 C.F.R. § 103.5(a)(1)(ii). *See also* section 103(a)(1) of the Act; section 204(b) of the Act; DHS Delegation Number 0150.1 (effective March 1, 2003); 8 C.F.R. § 2.1 (2003); 8 C.F.R. § 103.1(f)(3)(iii) (2003); *Matter of Aurelio*, 19 I. & N. Dec. 458, 460 (BIA 1987) (holding that legacy INS, now USCIS, is the sole authority with the jurisdiction to decide visa petitions).